

Objection to the Issuance of Confined Feeding Operation
AW Permit No. 4598/Farm ID No. 917 DaveCo Farms, LLC and David Ferguson,
Madison, Jefferson County, Indiana
2009 OEA 53, (08-W-J-4080)

OFFICIAL SHORT CITATION NAME: When referring to 2009 OEA 53, cite this case as
DaveCo Farms, LLC, 2009 OEA 53.

TOPICS:

CAFO
construction
permit
citizen suit
agency action
order
letter

PRESIDING ENVIRONMENTAL LAW JUDGE:

Mary L. Davidsen

PARTY REPRESENTATIVES:

IDEM: Steven Griffin, Esq., Nancy Holloran, Esq.

Petitioner: Robert M. Frye, Esq., E. Scott Treadway, Esq., Thomas W. Blessing, Esq.;
Stewart & Irwin PC

Permittee: Kathleen G. Lucas, Esq., Daniel P. McInerny, Esq.;
Bose McKinney & Evans LLP

ORDER ISSUED:

June 25, 2009

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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4. The Indiana Supreme Court decided Breitweiser's suit in favor of Ferguson. *Breitweiser v. Ind. Office of Environmental Adjudication*, 810 N.E.2d 699 (Ind. 2004). The Indiana Supreme Court affirmed the trial court's dismissal of the Breitweiser's complaint due to their failure to meet mandatory obligations for petitioners stated in Ind. Code § 4-21.5¹, *et seq.*, thus holding that the Breitweisers failed to exhaust their administrative remedies before the OEA.
5. I.C. § 13-18-10-2.2(b) requires construction of approved CFOs to begin within two (2) years of IDEM approval. Within two (2) years after the June, 2004 Indiana Supreme Court decision, Ferguson began construction of the CFO. In the Petition for Review in this cause, Petitioners assert that "Ferguson did not begin construction within two years of June 24, 2004", and that "Ferguson's permit has lapsed". *Petition, para. 4*. No further evidence was presented in the record of this cause supporting Petitioners' assertions.
6. On November 6, 2006, Ferguson sent a letter to IDEM describing the nature of construction activities at the CFO site, and requested that IDEM issue a status determination as to Ferguson's compliance with construction requirements stated in I.C. § 13-18-10-2.2(b).
7. On November 13, 2006, IDEM, via Assistant Commissioner of the Office of Land Quality Bruce Palin, issued a response letter to Ferguson, ("Palin letter") determining that "construction activities began at [Ferguson's CFO] in 2005 when a portion of the approved perimeter drainage system was installed . . . construction activities may continue until June 24, 2008 . . ." *Petition, para. 33, Motion Ex. A*.
8. The Palin Letter conclusively stated IDEM's position concerning commencement of construction of Ferguson's CFO.
9. On or about February 16, 2007, Petitioners inquired about the status of Ferguson's CFO in a certified letter. *Petition, para. 35, Motion Ex. B*.
10. On or about February 26, 2007, IDEM responded by transmitting a copy of the Palin letter to Petitioners' attorney, Thomas Blessing. *Motion, Att. C, affidavit of Michael Dunn, para. 5, Ex. 1*.

¹ I.C. § 4-21.5, *et seq.*, titled "Administrative Orders and Procedures Act", is referred to as "AOPA".

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11. On March 13, 2007, Petitioners Thomas and Jae Breitweiser and Sue Passwater, joined by Save the Valley, Inc. and Michael Dowden, filed a *Verified Complaint for Injunction and Declaratory Judgment* (“Complaint”) against Ferguson and IDEM in Jefferson Circuit Court. Included in the relief sought by the Complaint, was (1) a declaratory judgment “declaring that IDEM’s approval of Ferguson’s permit application had expired and that Ferguson’s CAFO (sic) permit is invalid and should be rescinded or revoked:” and (2) “an injunction prohibiting the construction and operation of Ferguson’s CAFO (sic).” *Motion, Att. A (Complaint, paras. 41(a), (b)). See also Save the Valley, Inc., et al. v. David Ferguson, et al.,* Jefferson Circuit Court, Cause No. 39C01-0703-PL-147, 896 N.E.2d 1205 (Ind. Ct. App. 2008).
12. In comparing the cause before this forum and the case before the Jefferson Circuit Court, Petitioners in this cause are included among the plaintiffs in the Jefferson Circuit Court case. The subject matter of the two matters is similar. Similar relief is sought by plaintiffs/petitioners from the two forums.
13. On June 14, 2007, Ferguson filed its Motion to Dismiss Complaint and Brief in Support of Motion to Dismiss (“Jefferson Circuit Court Motion to Dismiss”), with affidavits of IDEM’s Bruce Palin and Michael Dunn attached. *Motion, Att. B, C.* Each affidavit contained a copy of the Palin letter. *Id.*
14. Petitioners admit they had notice of the Palin Letter on or about June 14, 2007, at the latest. (“when did the 15-day deadline for filing an administrative appeal begin to run . . . 15 days after Ferguson served a copy of the Palin Letter on Petitioners in the Jefferson County lawsuit’.) *Petitioners Motion for Stay and Response to Motion to Dismiss, p. 7.*
15. On November 21, 2007, Jefferson Circuit Court Judge Roger L. Duvall granted Ferguson’s Motion to Dismiss, finding, *inter alia* that:
 5. [On] February 16, 2007, counsel for the Plaintiffs inquired of IDEM of the status of the Ferguson project and further provided the Plaintiffs’ opinion that the Ferguson project was not commenced in a timely manner and therefore the previously issued permit was not valid.
 6. The response of IDEM was to provide a copy of the [Palin Letter] by FAX [to counsel for the Plaintiffs].

Motion, Att. D.
16. Petitioners then filed a *Motion to Correct Errors* and *Motion to Stay Dismissal and for Leave to Amend Complaint*. In denying these Motion, Judge Duvall’s January 15, 2008 *Order* stated:

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4. [t]he Court finds that it lacks subject matter jurisdiction for the reason that Plaintiffs have failed to exhaust their administrative remedies. The correspondence of November 13, 2006, the “Palin Letter”, constituted agency action for which Plaintiffs should have first sought administrative relief.

Motion, Att. E.

17. The Indiana Court of Appeals affirmed Judge Duvall. *Save the Valley, Inc. et al. v. Ferguson, et al.*, 896 N.E.2d 1205 (Ind. Ct. App. 2008).
18. On December 5, 2007, Petitioners invoked the “citizen suit” provisions of I.C. § 13-30-1, *et seq.*, and issued notice to IDEM, the Indiana Department of Natural Resources, and the Office of the Indiana Attorney General (“Petitioners’ Notice”) demanding that “an administrative proceeding or civil action against Ferguson be commenced by the appropriate state agency(ies) within ninety (90) days pursuant to I.C. § 13-30-3-8.” *Petition, para. 38, Ex. C; para. 46(b)*. Petitioners further stated that “in the event that no action is taken by the appropriate state agency(ies) or department(s) within ninety (90) days, [Petitioners] will proceed with a civil action against Ferguson pursuant to I.C. § 13-30-3-8.” *Id.*
19. On March 14, 2008, Petitioners filed their Petition for Administrative Review in this cause, seeking administrative review of “IDEM’s determination that Ferguson was in compliance with the 2-year statutory deadline to begin construction”, *Petition, para. 46(a)*, and of “IDEM’s failure to institute administrative proceedings or a civil action within ninety (90) days of Petitioners’ Notice”, *Petition, para. 46(b)*. The Petition contains no dispute that Petitioners received or were on notice of the Palin Letter by June 14, 2007.
20. At least two hundred sixty (260) days elapsed between the date when Petitioners were each on notice of the Palin Letter by June 14, 2007 and the March 14, 2008 date when Petitioners filed their Petition for Administrative Review with OEA.

CONCLUSIONS OF LAW

1. The Indiana Department of Environmental Management (“IDEM”) is authorized to implement and enforce specified Indiana environmental laws, and rules promulgated relevant to those laws, per I.C. § 13-13, *et seq.* The Office of Environmental Adjudication (“OEA”) has jurisdiction over the decisions of the Commissioner of IDEM and the parties to this controversy pursuant to I.C. § 4-21.5-7, *et seq.*
2. This is a Final Order issued pursuant to I.C. § 4-21.4-3-27. Findings of Fact that may be construed as Conclusions of Law and Conclusions of Law that may be construed as Findings of Fact are so deemed.

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3. By this Final Order, OEA takes official notice of (1) the Save the Valley litigation in Jefferson Circuit Court and its related pleadings, motions and other filings in the court record; and (2) public records generated by IDEM regarding its review and approval of the development and implementation of Ferguson's CFO Approval No. AW-4598. I.C. § 4-21.5-3-26(f); *Roeschlin v. Thomas*, 280 N.E.2d 581, 584 (Ind. 1972)("we are bound to know the public records, including the acts of state officials").
4. In this case, Permittee/Respondent Ferguson's Motion to Dismiss challenges the legal sufficiency of the claim, as a motion to dismiss. Per Trial Rule 12(B)(6), a motion to dismiss tests the legal sufficiency of the claim, not the facts which support it. *Trail v. Boys and Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006). When ruling on a motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Huffman v. Office of Env'tl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). All reasonable inferences must be drawn in favor of the non-moving party. *Meyers v. Meyers*, 861 N.E.2d 704, 705-706 (Ind. 2007).
5. In determining the facts at issue, this Court must apply a *de novo* standard of review to this proceeding. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ. I.C. § 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "De novo review" means that all issues are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings. *Grisell v. Consol. City of Indianapolis*, 425 N.E.2d 247, 253 (Ind. Ct. App. 1981).
6. OEA is required to base its factual findings on substantial evidence. *Huffman v. Office of Env'tl. Adj.*, 811 N.E.2d 806, 809 (Ind. 2004)(appeal of OEA review of NPDES permit); *see also* I.C. § 4-21.5-3-27(d). While the parties disputed IDEM's determination that Ferguson had commenced construction within two (2) years, and whether IDEM was required to initiate a civil suit against Ferguson, OEA is authorized "to make a determination from the affidavits . . . pleadings or evidence." I.C. § 4-21.5-3-23(b). "Standard of proof generally has been described as a continuum with levels ranging from a "preponderance of the evidence test" to a "beyond a reasonable doubt" test. The "clear and convincing evidence" test is the intermediate standard, although many varying descriptions may be associated with the definition of this intermediate test." *Matter of Moore*, 453 N.E.2d 971, 972, n. 2. (Ind. 1983). The "substantial evidence" standard requires a lower burden of proof than the preponderance test, yet more than the scintilla of the evidence test. *Burke v. City of Anderson*, 612 N.E.2d 559, 565, n.1 (Ind. Ct. App. 1993). *GasAmerica #47*, 2004 OEA 123, 129. *See also Blue River Valley*, 2005 OEA 1, 11-12. *Objection to the Denial of Excess Liability Trust Fund Claim Marathon Point Service, ELF # 9810570/FID #1054, New Castle, Henry County, Indiana; Winimac Service, ELF #9609539/FID #14748, Winimac,*

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7. Construction of approved Indiana confined feeding operations (“CFO”) must commence the later of either (1) two (2) years, and be completed no later than four (4) years, after the date IDEM approves the CFO’s construction, or (2) the date all appeals brought under AOPA concerning the CFO’s construction have been completed. I.C. § 13-18-10-2.2(b). In this cause, the parties dispute whether Ferguson timely commenced construction.
8. “Agency”, as defined in AOPA, includes IDEM. I.C. §§ 4-21.5-1-3, 13-13-1-1. IDEM performs numerous duties, functions and activities, including issuing permits or licenses, conducting inspections, and issuing enforcement actions. “Agency actions” include “[a]n agency’s performance of, or failure to perform, any other duty, function, or activity under [AOPA].” I.C. § 4-21.5-1-4.
9. Petitioners seek redress from this forum for “IDEM’s failure to institute administrative proceedings or a civil action within ninety (90) days of Petitioners’ Notice”, *Petition, para. 46(b)*. I.C. § 4-21.5-2-5 exempts agency actions involving decisions to issue or not to issue “complaint[s] . . . or similar accusation[s].” I.C. § 4-21.5-2-5(8); *see also* I.C. § 4-21.5-2-5(9), (10).
10. Indiana’s citizen’s suit statute enables citizens, such as Petitioners, the right to file “an action for declaratory and equitable relief in the name of the State of Indiana . . . for the protection of the environment of Indiana” I.C. § 13-30-1-1.
11. Before Petitioners may file a civil action in the name of the State, they must first provide notice to IDEM, the Indiana Department of Natural Resources and the Office of the Indiana Attorney General. I.C. § 13-30-1-2(a).
12. The Citizen’s Suit statute does not mandate that IDEM, or any other agency, file suit; it only requires that the State agencies be given notice before the citizen commences its own suit. IDEM and the State agencies are given the discretion to file suit, but are not required to file suit once Petitioners’ notice is received. To appeal an agency’s choice not to act, a party must show that the agency failed to act when it had a duty to act. *MHC Surgical Center Associates, Inc. v. State of Indiana Office of Medicaid Policy and Planning*, 699 N.E.2d 306, 309 (Ind. Ct. App. 1998).
13. This forum is not given authority to review IDEM’s discretion not to act. I.C. § 4-21.5-2-5(8), (9), (10).

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14. Petitioners request that OEA review IDEM's alleged failure to institute proceedings or a civil action against Ferguson. Indiana's Civil Suit statute, I.C. § 13-30-1, *et seq.*, does not create a duty for IDEM to file suit. AOPA confers no jurisdiction on OEA to review IDEM's discretion not to act. As a matter of law, Petitioners are not entitled to recover under any set of facts admissible under the allegations of the complaint on the issue of IDEM's failure to institute civil proceedings against Ferguson.
15. Petitioners dispute IDEM's determination that Ferguson had commenced construction within two (2) years. "Order", per AOPA, is "an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." I.C. § 4-21.5-1-9.
16. AOPA requires a person who is "aggrieved or adversely affected" by, and wants to challenge, an agency action or order, to seek administrative review by filing a written petition for administrative review in compliance with I.C. § 4-21.5-3-7(a). Petitions for review of IDEM agency actions are filed with OEA, I.C. § 4-21.5-7, *et seq.*
17. Appeal of IDEM "agency actions" or "orders" must be appealed to OEA by filing a written petition for review within fifteen (15) days after the person is given notice. I.C. § 4-21.5-3-7(a)(3). If notice of the agency action or order is served by mail, the fifteen-day deadline is extended by three (3) days. I.C. § 4-21.5-3-2(e).
18. The Palin Letter is an "agency action." It is "the whole or part of an order" which determined Ferguson's legal status and rights concerning the CFO. The Palin Letter also constituted IDEM's performance of a "function" or "activity" under I.C. § 4-21.5-1-4. In its January 15, 2008 Order, the Jefferson Circuit Court specifically found that "[t]he correspondence of November 13, 2006, the "Palin Letter", constituted agency action for which Plaintiffs should have first sought administrative relief."
19. Petitioners initiated the Jefferson Circuit Court action on March 13, 2007, and initiated this administrative cause on March 14, 2008. The parties, issues and relief sought in this administrative cause are virtually identical to those in the Jefferson Circuit Court action. The Indiana Court of Appeals affirmed the Jefferson Circuit Court's decision, and remanded the case to the trial court "to vacate the existing orders and to enter an order dismissing the complaint for lack of subject matter jurisdiction." 896 N.E.2d 1205, 1206. "When a dispositive issue in a case has been resolved in such a way as to render it unnecessary to decide the question involved, the case will be dismissed." *Travelers Indem. Co. v. P.R. Mallory & Co.*, 772 N.E.2d 479, 484 (Ind. Ct. App. 2002). OEA is required to apply the Indiana Court of Appeal's determination of Petitioners' Jefferson Circuit Court case. The Indiana Court of Appeals affirmed the Jefferson Circuit Court's decision, including the decision that the Palin Letter constituted IDEM's agency action that Ferguson commenced construction within two (2) years. Petitioners were required to seek administrative review of IDEM's agency action determining that Ferguson commenced construction within two (2) years.

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20. OEA lacks subject matter jurisdiction over Petitioners' administrative cause. Petitioners were given notice of the IDEM agency action, the Palin Letter, by June 14, 2007 at the latest. Petitioners' March 14, 2008 filing of their Petition for Administrative Review exceeded the mandatory deadline required in I.C. § 4-21.5-3-7(a) and I.C. § 4-21.5-3-2(e) by at least two hundred sixty (260) days.
21. OEA does not have, and has no discretion to acquire, subject matter jurisdiction of a petition for administrative review filed after the deadlines mandated by statute. OEA must dismiss the Petition with prejudice. *Walker Mfg. Co v. Dep't of Local Gov't Finance*, 772 N.E.2d 1, 4-6 (Ind. Tax 2002); *In re: Objection to the Issuance of Notice of Decision, Murphy Oil USA, Inc., Seymour, Jackson County, Indiana*, 2004 OEA 51, 55; *Variance for Open Burning, Herring*, 2008 OEA 7; *In re: Objection to Denial of Excess Liability Trust Fund Claim, Frank Suverkup, Benzol Cleaning Co., Inc.*, 2004 OEA 48.

As a matter of law, OEA lacks subject matter jurisdiction over this cause.

FINAL ORDER

IT IS THEREFORE ORDERED that the Petition for Administrative Review, Adjudicatory Hearing and Stay of Effectiveness filed by Petitioners Thomas and Jae Breitweiser, Michael Bowen and Sue Passwater is hereby **DISMISSED**, and the Indiana Department of Environmental Management's November 13, 2006 determination that construction activities for the Confined Feeding Operation approval issued to Permittee/Respondent DaveCo Farms, LLC and David Ferguson by the Indiana Department of Environmental Management on July 1, 1998 is hereby **AFFIRMED**.

You are further advised that, pursuant to I.C. § 4-21.5-5, *et seq.*, this Final Order is subject to judicial review. Pursuant to I.C. § 4-21.5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED in Indianapolis, Indiana this 25th day of June, 2009.

Hon. Mary L. Davidsen
Chief Environmental Law Judge